IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1903.

BOARD OF TRADE OF THE CITY OF CHICAGO,
Petitioner,

vs.

CHRISTIE GRAIN AND STOCK COMPANY and C. C. CHRISTIE,
Respondents.

PETITION FOR CERTIORARI.

To the Honorable, the Judges of the Supreme Court of the United States:

The Board of Trade of the City of Chicago respectfully represents unto your Honors:

That it is a corporation created by special charter granted by the State of Illinois, under which it is authorized to conduct, and for more than forty-six years has been conducting, a commercial exchange in Chicago; that during certain market hours of each business day during said period products of the farm have been bought and sold by its members within its exchange hall, and the volume of such transactions is, and has been, such that said exchange has become the largest grain and

provision market in the United States; that certain portions of such exchange hall, commonly known as "pits," are specially set apart for trading in wheat, corn, oats and provisions, respectively.

That about the year 1880 certain improvements were made in telegraphic facilities for disseminating market news, whereby every change in the prices of grain and provisions in said "pits" could be electrically transmitted with such promptness that the making of the prices upon the exchange and the display of the quotations in offices of dealers throughout the country were practically simultaneous. (Rec., 6.)

That this distribution of petitioner's quotations is of great value to legitimate commerce and enables farmers and country grain dealers to avoid being overreached in the sales of their products.

That for some years prior to August, 1900, petitioner allowed certain telegraph companies without charge to collect such quotations upon its exchange floor, and imposed no restrictions upon their sale thereof, and this, and similar conduct of other commercial exchanges, gave rise to a large and increasing number of bucket-shops.

That a bucket-shop is a place where its proprietor posts upon a blackboard the market quotations of leading commercial exchanges, and stands ready to make bets with all comers upon the course of such blackboard prices, each "trade" being opened at the last quotation then on the blackboard; and being closed at the last quotation on the blackboard at the time of closing. A "margin" is exacted from each customer, and when this is exhausted, according to the blackboard price, the so-called "trade" is at an end. The keeper takes out of each trade an arbitrary profit, miscalled a commission, which enables him to profitably assume the

risk incident to the fluctuations of the market, such risk being present for him only to the extent that the so-called purchases of his customers exceed in the aggregate their so-called sales, or *vice versa*. *Thus these quotations are essential to the existence of all bucket-shops.*

That by reason of this misuse of its quotations, petitioner, about August 1, 1900, adopted a new policy whose objects were (1) to prevent the use of its quotations by bucket-shops, and (2) to enable petitioner to derive revenue from its quotations; and to that end petitioner after said date exacted from the four telegraph companies to which it thereafter furnished its quotations, contracts in which they severally agreed that they would not sell said quotations to any bucket-shop and would exact from every person to whom they sold the same a written agreement that he would neither use said quotations in conducting a bucket-shop nor allow them to be taken from his office. (Rec., 10-18.)

That in said contracts said telegraph companies agreed to pay, and have since then paid, to petitioner for its said quotations sums which now give petitioner a yearly revenue of over $30,000, petitioner on its part agreeing to take all reasonable steps to prevent persons from purloining such quotations.

That being thus unable to purchase said quotations from the telegraph companies, many of the bucket-shops (and others acting in their interests) at once commenced to systematically steal said quotations by tapping the wires of the telegraph companies, over which they were passing; and thereby an illicit trade in such quotations was inaugurated and is maintained, thus to a large extent defeating the purpose of petitioner to prevent the use of its quotations by bucket-shops, and endangering its revenue from such quotations.

That thereupon petitioner instituted suits in equity in many of the federal courts in the central West, including the present suit, to protect its property right in these quotations and prevent the purloining thereof.

That the Federal Court at Chicago (Judge Kohlsaat) decided that petitioner had a property right in its quotations, and enjoined certain persons, in said suit made defendants, from stealing such quotations (105 Fed., 794), and this decision was affirmed by the Circuit Court of Appeals of the Seventh Circuit. (56 C. C. A., 205; 119 Fed., 301.) That the result of those decisions was that, whereas there were on August 1, 1900, twenty-seven bucket-shops in Chicago posting petitioner's quotations, there are now none, thus demonstrating that it is practicable for petitioner and other exchanges to entirely prevent the use of their quotations in bucket-shops.

That the suit at bar is a bill in equity filed by petitioner against these respondents (Rec., 3-22), wherein said contracts between petitioner and said telegraph companies are set out, and it is averred that these respondents had not signed contracts with the telegraph companies entitling them to receive these quotations, but were purloining, posting, and otherwise using the same at their place of business at Kansas City; that respondents filed an answer averring (among other things) that said quotations grew out of trades in the exchange hall of petitioner which were gambling transactions, and that petitioner, in maintaining such exchange hall, was keeping a bucket-shop contrary to a criminal statute of Illinois entitled "An Act to suppress bucket-shops and gambling in stocks, bonds, petroleum, cotton, grain, provisions or other produce," approved June 6, 1887; that petitioner filed exceptions to said answer upon the ground that such averment constituted no defense in law to said

suit; that these exceptions were overruled, and much proof was thereafter taken in support of said averment, and upon final hearing in said Circuit Court, his Honor, Judge Hook, decided that such defense was not established by the evidence and granted petitioner, first an interlocutory, and subsequently a permanent, injunction. (See opinions, Rec., 956, 972.)

That thereupon respondents perfected, first an appeal from the interlocutory order, and subsequently an appeal from the final decree, to the Circuit Court of Appeals of the Eighth Circuit, where said two appeals were consolidated (Rec., 1015), and that court decided that said quotations grew out of transactions for future delivery between petitioner's members, which were in all essentials gambling transactions, and that by reason thereof petitioner violated said criminal statute of Illinois, and did not come into court with clean hands, nor for a lawful purpose, and on this ground said Court of Appeals reversed said decree of said Circuit Court with instructions to dismiss said bill upon the merits. (See opinion, Rec., 990.)

That thereafter petitioner filed its petition for rehearing, which was, on the 11th day of January, 1904, denied.

That a similar suit was instituted by petitioner in the Federal Court at Indianapolis against certain persons there purloining said quotations, and in said suit the same defense was interposed, and in support thereof practically the same evidence was introduced, as in the present suit; that upon appeal of said suit to the Circuit Court of Appeals of the *Seventh* Circuit, said court has recently decided in favor of this petitioner (thus in effect declining to follow said decision of the Circuit Court of Appeals of the Eighth Circuit), and directed the entry of a decree in favor of petitioner, thus

creating, as between the Circuit Courts of Appeals of the Seventh and Eighth Circuits, a direct conflict of decisions. (See its opinion at the end of petitioner's brief filed in support of this application.)

That other similar suits have been brought by petitioner, and are still pending, in the federal courts at Cincinnati, Minneapolis, Grand Rapids, Detroit, Indianapolis and Buffalo, and there are also pending appeals in two similar cases in the Circuit Court of Appeals of the Eighth Circuit; that in each of these cases the same defense has been interposed and the same question arises as in the case at bar.

That it is also the purpose of petitioner to institute from time to time other similar suits in the federal courts of other districts and circuits, for the purpose of protecting its property right in its quotations against purloiners, and in these also, the same defense will doubtless be interposed and the same question will arise.

That respondents (as do others in the same kind of business) have private telegraph wires connecting their principal office with numerous branch offices located in other states, and over these wires transmit such stolen quotations to such branch offices, and that, should petitioner in said Eighth Circuit be adjudged not entitled to decrees to protect its said quotations, the defendants in such suits could, and undoubtedly would, establish numerous branch offices within the other federal circuits and use therein such stolen quotations, even though the courts of such other circuits should decide in favor of petitioner's right to protect its quotations from purloiners.

That said criminal statute of Illinois, after the sections thereof quoted in the opinion of the Circuit Court of Appeals of the Eighth Circuit (Rec., 993) provides in the 4th section thereof as follows:

"It is the intention of this act to prevent, punish and prohibit, within this state, the business now engaged in and conducted in places commonly known and designated as bucket-shops, and also to include the practice now commonly known as bucket-shopping by persons, corporations, associations, or co-partnerships, who ostensibly carry on the business or occupation of commisison merchants or brokers in grain, provisions, petroleum, stocks and bonds,"

thus confining that statute, as petitioner is advised by counsel, to a prohibition of two things: (1) the keeping of a bucket-shop; and (2) the practice of bucket-shopping by persons who ostensibly act as brokers or commission merchants. That petitioner does neither of these things; that it neither as principal nor as broker makes any trades or transactions; that it only maintains an exchange hall, where others trade.

That it is also provided in said criminal statute of Illinois as follows (Sec. 4):

"And it shall be the duty, under this act, of all the judges of the several circuit courts in this state, and of the judges of the criminal court of Cook county, at every regular term thereof, to charge all regularly impanelled grand juries to make due investigation and report upon all violations of the provisions of this act."

And that, although said statute has been in force since 1887, it has never been decided by any court of Illinois, nor any public official charged with the enforcement of that criminal statute, that petitioner was within the class of persons contemplated by such statute; nor has any indictment ever been rendered against petitioner under that statute.

That, as the evidence shows, a large part of the trading for future delivery upon petitioner's exchange is by grain buyers, whose purpose is, not to assume the risk of, in order to profit by, the fluctuations of the market, but who, when they buy grain in the country, always sell, from time to time,

a like quantity upon petitioner's exchange for future delivery; that a large part of the grain so bought is not actually delivered upon these future sales (1) because some of such grain, when it reaches Chicago, does not come up to the required grade so as to be deliverable upon such sales, and (2) because such grain dealers can frequently make more profit by selling the actual grain elsewhere for export or consumption, instead of delivering it upon such future sales, and that in either of such cases, such grain dealers are then obliged to, and do, close out their time sales by making corresponding time purchases; that this practice is called "hedging," and forms an essential part of the present scheme of crop distribution, in which the members of all the principal grain and cotton exchanges participate, and by thus eliminating risk from fluctuations of prices these middlemen are able to take smaller profits and the producers get better prices. That this "hedging" is shown by the evidence to be extensively resorted to also by elevator owners, millers and packers.

That the Circuit Court of Appeals of the Eighth Circuit has in this case adjudged the transactions upon petitioner's exchange in which deliveries are not in fact made, *including these hedging transactions*, gambling transactions; that it does so solely by reason of the fact that such transactions are not in fact closed by deliveries; and that this decision, if not reversed, is calculated to bring into discredit, and place a stigma upon, the many merchants connected with the grain and cotton exchanges of the country who participate in the business of marketing the crops, and injure them in their business; and it will also create in the minds of many people throughout the country an unfounded and unjust prejudice against such exchanges and their members.

That said Circuit Court of Appeals also based its decision in part upon the proposition that said quotations were fur-

nished by petitioner to the telegraph companies as "a means of encouraging speculation in futures and in gambling," but that neither in the pleadings nor in the evidence is there any support for this proposition.

That said decision, if not reversed, will not only in said Eighth Circuit wholly defeat, but will in the other federal circuits seriously embarrass, petitioner's efforts to safeguard, and prevent an improper use of, its quotations.

That petitioner is advised by counsel that said defense so interposed by respondents, and held to be valid by said Circuit Court of Appeals, is neither sufficient in point of law, nor supported by the evidence in this record; that your petitioner verily believes that the legality of the said transactions occurring upon its exchanges, and the right of petitioner, and other exchanges similarly situated, to resort to the federal courts for the protection of their property, are questions of such gravity and importance, that they ought to be decided by this court, and that a *certiorari* should also issue in order that said conflict of decisions between the Circuit Courts of Appeals of the Seventh and Eighth Circuits may be removed, and the federal law on this subject be rendered uniform.

That petitioner presents herewith and makes a part of this petition a certified transcript of the record of this cause in said Circuit Court of Appeals.

Wherefore your petitioner prays that this court issue a writ of *certiorari* to the United States Circuit Court of Appeals for the Eighth Judicial Circuit, directing it to certify to this court a record of its proceedings in said cause.

BOARD OF TRADE OF THE CITY OF CHICAGO,
By HENRY S. ROBBINS,
Its Solicitor.

HENRY S. ROBBINS,
Of Counsel.

UNITED STATES OF AMERICA,
NORTHERN DISTRICT OF ILLINOIS, } ss.
NORTHERN DIVISION.

George F. Stone, being first duly sworn, deposes and says that he is secretary of the petitioner, Board of Trade of the City of Chicago; that he has read the foregoing petition and knows the contents thereof, and that the same is true in substance and in fact, except as to those matters therein stated to be upon information and belief, and as to those, he believes said petition to be true.

GEORGE F. STONE.

Subscribed and sworn to before me this 12th day of April, A. D. 1904.

MARTIN HOWARD FOSS,
Notary Public.

[NOTARIAL SEAL.]

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BOARD OF TRADE OF THE CITY OF CHICAGO,
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vs.

CHRISTIE GRAIN AND STOCK COMPANY and C. C. CHRISTIE,
Respondents.

BRIEF ON MOTION FOR CERTIORARI.

The question that this application seeks to have this court review, is:

Whether the federal courts should refuse to entertain suits by the Chicago Board of Trade and other commercial exchanges similarly situated to prevent bucket-shops and others from stealing their market *quotations*, upon the ground that most of the *transactions* between the *members* in the exchange hall are gambling transactions.

This general question is divisible into three:

(1) Is it, in point of law, a good defense to such a suit brought in a federal court in one state, that complainant violates a criminal statute of *another* state by maintaining therein an exchange hall where its members trade extensively without intending delivery?

(2) Is any commercial exchange or board of trade included within this criminal statute of Illinois passed "to suppress bucket-shops and gambling in stocks, grain, provisions, or other produce"?

(3) If so, are the transactions between petitioner's members gambling transactions to such an extent that petitioner, by maintaing an exchange hall where they are made, violates that statute?

All of these questions the Circuit Court of Appeals of the Eighth Circuit decided against the petitioner (see opinion, Rec., 990), and reversed a decree entered in its favor by Judge Hook (see opinions, pp. 956, 972) on a bill in equity brought by petitioner to protect its quotations from purloiners. A similar result will follow in three other like suits pending in the same circuit, if this writ is denied. Thus, this decision closes the doors of the federal courts of the Eighth Circuit against this petitioner, at least in this class of suits, and when followed in other circuits, will close the doors of federal courts against it in numerous suits now pending, and to be brought by petitioner, to protect its property in its quotations.

The Circuit Court of Appeals of the *Seventh* Circuit has recently declined to follow this decision of the Circuit Court of Appeals of the *Eighth* Circuit, and in a case similar to the one at bar has directed a decree in favor of this petitioner. (See its opinion printed at end of this brief.)

A writ of *certiorari* is here sought upon the grounds—

(1) Of a conflict of decisions in the Circuit Courts of Appeals of the Seventh and Eighth Circuits; and

(2) That the questions here involved are of such gravity and importance, and their decision of such consequence to commerce and commercial exchanges, as to justify their review by this court. There would seem to be authority for this case in *Clews* v. *Jamieson*, 182 U. S., 461, where this court reviewed, and reversed, upon *certiorari*, a decision declaring time trading upon the Chicago Stock Exchange gambling.

I.

IS IT A DEFENSE TO A SUIT BROUGHT BY A COMMERCIAL EXCHANGE IN A FEDERAL COURT IN ONE STATE TO PROTECT ITS MARKET QUOTATIONS, THAT IT VIOLATES A CRIMINAL STATUTE OF ANOTHER STATE IN MAINTAINING AN EXCHANGE HALL WHERE ITS MEMBERS MAKE TRANSACTIONS, IN WHICH THE INTENTION TO DELIVER IS ABSENT?

This suit was brought in *Missouri* and was dismissed by the Circuit Court of Appeals solely by reason of a supposed violation by complainant of a criminal statute of *Illinois*.

It is not the function of courts of equity—much less of federal courts of equity—to give effect to criminal statutes by denying a plaintiff relief merely because he is a criminal.

Much less should a court—state or federal—in one state deny a complainant relief merely because he has violated a criminal statute of another state. It is well settled that "the penal laws of a country do not reach, in their effect, beyond the jurisdiction where they are established."

Thus, in

Commonwealth v. *Green*, 17 Mass., 514, 540,

it was held that the conviction of an infamous crime in another state did not render a witness incompetent, Chief Justice Parker saying:

"To refuse a man the right to be a witness on account of a conviction in another country, would be to suffer that conviction to have force here, and, in some measure, to carry it into execution."

This court approved this case and held the same way in

Logan v. *United States*, 144 U. S., 263, 303.

Why should an infraction of a foreign criminal statute incapacitate a party when it does not a witness?

In

State v. *Pelican Insurance Co.*, 127 U. S., 265, 289,

this court said:

"By the law of England and of the United States, the penal laws of a country do not reach beyond its own territory, except when extended by express treaty or statute to offenses committed abroad by its own citizens; and they must be administered in its own courts only, and cannot be enforced by the courts of another country."

The Antelope, 10 Wheat., 66, 123,

where Chief Justice Marshall said:

"The courts of no country execute the penal laws of another."

Folliott v. *Ogden*, 1 H. Blackst., 123, 135,

where it was held that an attainder in another country, depriving one of his property, did not prevent him from suing on a bond in England, it being said that "the penal laws of foreign countries are strictly local."

Hence, if corn were manufactured into whiskey in Dubuque, contrary to a criminal statute of Iowa, and the whiskey were transported to Illinois, it would there be a legitimate subject of commercial intercourse, being "as recognized by the usages of the commercial world" (*In re Hahrer*, 140 U. S., 545-556), and the Illinois courts could not properly refuse the manufacturer a right to sue for his property. Otherwise, extra territorial effect would be given to the Iowa liquor law.

So the federal courts in one state should not refuse to protect the property in market news—which is in itself, as we shall hereafter see, helpful to commerce—merely because the complainant, by maintaining a hall where such news

originates, violates a criminal statute of another state; for this would be giving to such statute an extra territorial effect.

The Circuit Court of Appeals held that, because petitioner was violating a criminal statute of Illinois, it did not come into the court in Missouri "with clean hands." But is it not apparent that, if this clean hands doctrine were otherwise applicable, violations of a penal statute in Illinois cannot make a complainant's hands unclean in a Missouri court, because an Illinois criminal statute has no extra territorial effect?

But aside from this, to apply the clean hands doctrine to petitioner is to ignore the undisputed limitations of that doctrine.

In

Fuller v. *Berger*, 56 C. C. A., 588; 120 Fed., 274,

the Circuit Court of Appeals of the Seventh Circuit, in refusing to apply the doctrine, said (p. 278):

"Equity is not concerned with the general morals of a complainant; the taint that is regarded must affect the particular rights asserted in his suit. * * * If the defendant can do no more than show that the complainant has committed some legal or moral offense, *which affects the defendant only as it does the public at large*, the court must grant the equitable remedy and leave the punishment of the offender to other forums. In the present case, there have been no dealings between the parties. Nothing has been done to mislead appellees. And appellant, to make his case, simply brings forward his patent and proves the continued and threatened infringement. Against this, appellees establish that appellant has been misusing the patented device. But how does this concern appellees more or differently than it does others?"

The authorities agree that, under the clean hands doctrine, "the wrong must have been done to the defendant him-

self and must have been in regard to the matter in litigation."

City of Chicago v. *Stock Yards*, 164 Ill., 224-238.
Bateman v. *Fargason*, 4 Fed., 32.
Ansley v. *Wilson*, 50 Ga., 421.
Langdon v. *Templeton*, 66 Vt., 173.
1 Pom. Eq., Sec. 399.
Board of Trade v. *Kinsey* (opinion attached).

If petitioner does wrongfully permit illegal transactions upon its exchange, such misconduct prejudicially *affects these respondents only as it does the public at large.*

Furthermore, the alleged misconduct of petitioner does not, within the above rule, relate to the subject-matter of this suit, the quotations.

The uncontradicted evidence in this record is that these quotations and their general dissemination are highly beneficial to legitimate commerce. Respondents' answer so admits (Rec., 63-64) and respondent Christie testified (Rec., 522, 524) that these quotations are now almost indispensable to the grain trade. The Illinois Supreme Court in *Stock Exchange* v. *Board of Trade*, 127 Ill., 153, held that these quotations had become so essential to legitimate commerce as to have become impressed with a public use to the extent that, if distributed at all, they must be given, upon the same terms, to all persons desiring them *for lawful purposes.* In a later case (*Central Stock & Grain Exchange* v. *Board of Trade*, 196 Ill., 396), the same court held that bucket-shops were not entitled to them.

So, too, petitioner's conduct with respect to the quotations, is not at all reprehensible. It gives them to all persons desiring them for lawful purposes (see contract, Rec., 10-18), and seeks to withhold them only from bucket-

shops. Hence the alleged misconduct of petitioner does not relate to the subject-matter of this suit.

We do not here overlook the statement in the opinion of the Circuit Court of Appeals (Rec., 1001) that these quotations are "furnished by the Board of Trade and sent out over the lines of the Telegraph Companies as a means of encouraging speculation in futures and in gambling upon the rise and fall of the market." There is, however, neither in the pleadings nor in the evidence any basis for this statement. The answer does not aver such to be the fact, and no evidence was introduced to prove it. The only inference as to petitioner's purpose deducible from this record is that it furnishes these quotations to the telegraph companies for the purpose of realizing the large revenue therefrom.

The real position of the Circuit Court of Appeals is that petitioner should be denied protection of its *quotations* because they "grow out of *transactions* had in the exchange hall of the Board of Trade of such a nature that they come within the condemnation of the statute of Illinois."

This seems to us directly contrary to two decisions of this court.

Brooks v. *Martin*, 2 Wall., 70-79.
Planters' Bank v. *Union Bank*, 16 Wall., 483-499.

In the former case two persons had joined in a purchase of soldier's claims, which was prohibited by Congress. Certain money which "grew out" of these illegal transactions was in the hands of one of them, and this court sustained a bill by the other to get his share of it.

In the latter case a party to a sale of confederate bonds, which was illegal, was allowed to recover from the party who had made it the proceeds of such sale.

Nor could a court of equity, under this clean hands doctrine, refuse to protect petitioner's property in its quotations, merely because they produce a part—and not an essential part—of the general revenue, which it uses to maintain a commercial exchange, including an exchange room, where, besides the transactions claimed to be illegal, is conducted a large volume of business in many commodities, whose legality no one assails.

Would the keeper of a bucket-shop be denied the right to foreclose a mortgage upon the ground that it was part of the capital of a business prohibited by a criminal statute?

Would a court of equity refuse to protect property upon which was a race track, because the owner permitted an anti-pool-selling statute to be there violated?

If upon this ground petitioner cannot maintain this suit, then it could not resort to a court of equity to redeem from its mortgage on its building, if it does not prevent the bucket-shop law of Illinois being there violated.

There is, it is true, quite apart from this clean hands doctrine, a principle that relief is in some cases denied from considerations of public policy. Thus courts refuse protection to a trade name that is calculated to deceive the public. This is because such a name speaks a lie and is hurtful to the public. Here equity does not concern itself with either party, but considers only the public welfare, and the sole question is, does public policy require the withholding of relief?

But the legal sufficiency of this defense cannot be rested upon this principle, because it is self-evident that the quotations are neither fictitious nor hurtful to the public, and that the public welfare will be best advanced by having petitioner succeed in its efforts to restrict its quotations to lawful

traders and prevent their misuse in bucket-shops. This the *granting* of relief would accomplish.

On the other hand, petitioner neither derived revenue from, nor restricted the use of, its quotations prior to August 1, 1900. Yet for many years before that date this future trading on a large scale took place upon its exchange. Its failure in this litigation could not reasonably do more than restore the situation existing prior to August 1, 1900. How, then, would the public be benefited by *denying* petitioner relief?

Thus, upon no recognized principle of equity was the Circuit Court of Appeals justified in outlawing petitioner from the Federal Courts of the Eighth Circuit—for that is what it amounts to,—even if these quotations do grow out of transactions, in which the intention to deliver is wanting, and those transactions occur in a hall kept by petitioner in violation of a criminal statute of Illinois.

II.

IS A COMMERCIAL EXCHANGE WITHIN THIS CRIMINAL STATUTE OF ILLINOIS, AS HELD BY THE CIRCUIT COURT OF APPEALS OF THE EIGHTH CIRCUIT?

This question affects not only petitioner, but all commercial exchanges in Illinois. As this statute has been re-enacted in Missouri (R. S. Mo., 1899, Secs. 2223, 2225), and there are now in that state two exchanges, the St. Louis Chamber of Commerce and Kansas City Board of Trade, where the character of the business is the same as upon petitioner's exchange, this decision also deprives these exchanges of access to the federal courts.

This statute in this respect has never been construed by the

Illinois courts. *Soby* v. *People*, 134 Ill., 66, referred to at length in the opinion of the Circuit Court of Appeals (Rec., 994) had reference to a *broker's* office, and the conviction of the broker under this statute was sustained. Its language should be confined to its facts (*Carroll* v. *Lessee*, 16 How., at p. 286), and it is not an authority to justify the application of this statute to a commercial exchange.

In construing this statute, the general public policy of Illinois and its other legislation should be considered. That public policy has been to encourage the maintenance of commercial exchanges.

The commercial history of the world long ago demonstrated that exchanges are essential to the highest development of commerce. No great commercial or financial center is without one.

As early as 1849, the great future of the grain trade of the Northwest was foreseen, and the necessity for an exchange in Chicago to facilitate that trade was apparent. In that year the Illinois legislature passed a general statute providing for the incorporation of boards of trade with such powers as are usual in the management and conduct of such institutions. (Gross' Stat. of Ill., p. 116.) The Chicago Board of Trade was incorporated originally under this general act, and continued to exist thereunder until 1859, when its usefulness to the commerce of the state having been demonstrated, the Illinois legislature granted it its present special charter (see charter in exhibit, book of rules), thereby incorporating " the persons now composing the Board of Trade of the City of Chicago" into the present corporation. Sections 4 and 12 of that charter are as follows:

"Sec. 4. The said corporation is hereby authorized to establish such rules, regulations and by-laws for the man-

agement of their business, and the mode in which it shall be transacted, as they may think proper."

"Sec. 12. Said corporation shall have no power or authority to do or carry on any business, excepting such as is usual in the management of Boards of Trade, or Chambers of Commerce, or as provided in the foregoing sections of this bill."

The legislative intent is thus apparent to sanction in Chicago a corporation, with full power to maintain a commercial exchange for the transaction of such business as is, or should become, "usual" in boards of trade or chambers of commerce. In passing this statute the legislature knew the proper office of an exchange to be to furnish facilities for the easy and economical exchange of commodities, and intended by section 12 that this exchange should have all the powers necessary to enable it to compete successfully with rival exchanges of other cities for the grain trade of the northwest. This charter is a perpetual one.

About 1880 (Rec., 920, 921) the instrument known as the "ticker" was perfected, whereby the news of prices prevailing upon an exchange could be automatically and instantly transmitted and widely disseminated. This gave rise to the bucket-shop, a place where people assemble to bet with the proprietor upon the fluctuations of prices on an exchange, as the same are posted upon a blackboard in such shop. This evil at once assumed such proportions that the Illinois legislature realized the necessity of a law for its suppression. This bucket-shop statute of 1887 was the result.

That statute and the previous one granting petitioner its charter are to be construed together. The later act is not to be so construed as to nullify the former, unless this is the necessary inference of the legislative intent. The first act established a corporation with perpetual life and granted it power to maintain an exchange for the transaction of such

business as might be "usual in the management of boards of trade or chambers of commerce." The second act contemplates a *forfeiture of the charter* of every corporation within its terms, if the offense therein defined is continued after a first conviction. Can it be that the Illinois legislature, in the act of 1887, contemplated the termination of the charter of this exchange—which plays so important a part in the commerce of the state—because of speculation in its hall, which, as we shall see, it cannot stop without destroying its efficiency as an exchange? If such had been its purpose, would it not have used language more plainly indicating such intention? The nature of the business upon petitioner's exchange in 1887 was, and was then generally known to be, the same as it is now. The legislature then knew that the facilities, which this exchange afforded, unavoidably gave rise to much speculation.

Is it not plain that the act of 1887 was intended to reach, not this large commercial exchange, but only offices maintained by bucket-shop keepers and those who act ostensibly as brokers? Indeed, the legislature has so declared in that part of the fourth section of the act which is quoted in the petition herein. Petitioner is clearly, not within either of the two classes to which the statute is thus confined. It conducts no business at all. It makes no transactions, as do bucket-shops and brokers.

Such has been the practical construction placed upon the statute by the courts and public officials of Illinois ever since its passage. This statute requires (Sec. 4) that every grand jury should be specially charged to investigate violations of this act. Such has been the practice in Chicago ever since its passage; yet never has it occurred to anyone to indict petitioner, nor has public sentiment ever thought juries or officials derelict for not doing so.

It is therefore submitted that the Circuit Court of Appeals of the Eighth Circuit erred in holding that this criminal statute of Illinois includes commercial exchanges like petitioner.

III.

THE PETITIONER DOES NOT VIOLATE THIS ILLINOIS STATUTE, EVEN IF IT BE CONSTRUED TO INCLUDE COMMERCIAL EXCHANGES.

These quotations are the prices in the "pits" where the trading is almost entirely for future delivery. As to these transactions, the Circuit Court of Appeals says (Rec., 1,000) (italics ours):

"There is absolute unanimity in their evidence to the effect that much the larger part of these transactions were deals wherein it was not *expected or understood* that there would be any delivery of the article nominally dealt in, but the same were carried through and settled by methods clearly devised to avoid the need of actual delivery.

The estimates of the witnesses vary as to the percentage of the transactions in which actual delivery was *contemplated* or had, running from one to fifteen per cent., thus proving that at least eighty-five and more probably ninety-five per cent. of the transactions would come under the condemnation of the Illinois statute."

The witnesses whose testimony is here referred to were *eleven* members, or clerks of members, of petitioner, *selected* by respondents out of a total membership of eighteen hundred and out of several hundred members actively trading in these pits. Each witness necessarily confined his testimony to his own, or his firm's, business.

Not one of these witnesses testified that in a single trade —much less in his business as a whole—"it was not expected or understood that there would be any delivery of

the article nominally dealt in." Not one of these witnesses gave his estimate "as to the percentage of transactions in which actual delivery was contemplated." Each did give his estimate of the percentage of his firm's transactions in which deliveries were *actually made*, and this varied with the different witnesses from five to fifteen per cent. From this, and this alone, the Circuit Court of Appeals found that "at least eighty-five per cent. and more probably ninety-five per cent. of the transactions" were "in all essentials gambling transactions." In other words, that court held that the mere fact that deliveries were not made at the *maturity* of these time-contracts is in itself sufficient to prove that deliveries were not *intended* when the contracts *were made*.

The unsoundness of this conclusion is easily demonstrated by considering the nature of the business of a certain class of traders, the grain buyers, who participate largely in this future trading. The testimony of Mr. Marcy (Rec., 109-140), the vice-president and manager of the Armour Grain Company, one of these grain buyers, stands uncontradicted in this record, and will sufficiently illustrate the business of this class. Mr. Marcy's company does a strictly merchandising business. It does not speculate at all. (Rec., 113.) It makes no contracts for future delivery except as a part of its grain business (Rec., 130) and except a very little commission business it does for others. The volume of its own grain business is 50,000,000 bushels a year or more. Every evening it sends from Chicago to numerous country points, offers to buy at a certain price, if accepted by a certain hour the next morning. The next morning it aggregates the amount of these acceptances, and at once sells in the proper pits of petitioner's exchange *for future delivery* a like quantity of grain, such sales contemplating grain of a certain established grade. The aim of the Ar-

mour Grain Company in doing this is to at once find a place for the grain it has bought, and thus eliminate all speculation or risk incident to the fluctuations of the market. Much of this grain, when thus bought, is not in a condition to go upon the market. In due time the grain is shipped to the Armour Grain Company at Chicago; is there inspected, put into elevators, and warehouse receipts issued therefor. If the grain is up to the grade specified in its time sales, the company frequently delivers it upon its sales. If it does not come up to the required grade, it is necessarily sold as off-grade grain. Again, between the making of these sales for future delivery, and their maturity, the Armour Company frequently finds it more profitable to divert the actual grain from Chicago to some other market, or, when it reaches Chicago, to sell it at once for export or consumption, than to hold and deliver it upon these future contracts. When sold as off-grade grain, or thus sold more profitably for export or consumption, the Armour Company, to meet its sales for future delivery, immediately upon selling the actual grain, makes, in petitioner's "pits" contracts to *purchase* the same quantity of the same kind of grain for delivery in the same month as in its previous sales. This practice is called in the trade "hedging."

The uncontradicted evidence of Mr. Marcy (Rec., 114) is that this opportunity to hedge is of great commercial value, and has reduced (to the producer and consumer) the cost of handling the grain several cents a bushel, the grain being now "moved from the farmer to a foreign market on a margin of probably a cent and a half to two cents a bushel, covering all commissions in between," and that "we could not do our business without it."

The Circuit Court of Appeals holds such of these hedg-

ing contracts by grain buyers, as are not completed by actual delivery, illegal. This will be the more apparent by reference to Judge Thompson's decision (115 Fed., 575), which the Circuit Court of Appeals approves, and which expressly declares these hedging transactions illegal.

To determine the legality of this hedging, take a single one of these transactions. The Armour Company buys 5,000 bushels of wheat, and at once proceeds to find an assured place for it by immediately selling in the "pits" an equal quantity for future delivery. Measured by the legal rule or test applied to the usual exchange transactions (*Clews* v. *Jamieson*, 182 U. S., 461) this sale is legal unless *at the time it was made* the Armour Company did not intend delivery. Mr. Marcy clearly testified that his company did not make a future sale until it had purchased a like amount in the country, and that the grain thus purchased is brought to Chicago and delivered upon this contract unless, when it gets to Chicago, it does not come up to the required grade for future delivery, or unless, intervening the making of the purchase in the country and the time of delivery on the sale, some one is willing to pay more for this grain than can be made by delivery upon the future sale. Now, when the Armour Company sells the wheat in the pit it does not know that the wheat purchased in the country will *not* grade so as to be deliverable, as inspection does not take place until it gets to Chicago. It is only after inspection in Chicago that the Armour Company forms the intention not to deliver upon its future sale. So, too, the opportunity to sell more profitably for immediate delivery for export or consumption does not arise until after the grain reaches Chicago. Thus in neither contingency does the Armour Company intend not to deliver at the time it makes the hedging sale. Such in-

tention arises from subsequent events. The intention is formed *after the sale,* and for a legitimate reason.

If this single transaction, as seems clear, does not contain the gambling intent, and is valid, how can the business as a whole be illegal? If, as respects a single transaction, failure to complete the sale by actual delivery does not prove it illegal, how can the aggregate of such transactions be so regarded merely because in a large portion of them delivery is not in fact made? Yet such is the decision of this Circuit Court of Appeals.

The evidence shows the future trading by the Armour Company in these pits to be exclusively of this class, and to aggregate in one year sales of 50,000,000 bushels, and that some of these transactions, involving 9,718,000 bushels, or about 20 per cent., were completed by actual delivery, the balance being closed by counter purchases under circumstances already explained. Wherein does that part of these future sales of 50,000,000 bushels, which did not result in actual delivery, differ, as respects legality, from the sales of the 9,718,000 bushels thereof, which were actually delivered? *The intention was the same at the time the transactions were made.*

To continue further the consideration of the business of these grain buyers, and as typical thereof, that of the Armour Company, we have seen that 80 *per cent.* of its hedging sales are closed by counter purchases of the same quantity for the same month's delivery. If no method or opportunity for settling these off-setting contracts were presented, the Armour Company would be compelled to await the delivery month before it would be rid of them. To obviate this and the risk and expense attending it, a system has been devised, which is recognized in petitioner's rules and is facilitated by the maintenance by it of a clearing

house, to eliminate these *practically closed* trades by offsetting them. Most of this large record is taken up in showing the working of this system of settlement.

This is what the Circuit Court of Appeals refers to by the words "settled by *methods* clearly devised to avoid the need of actual delivery," the court evidently thinking this system should be condemned as illegal. But this is in direct conflict with *Clews* v. *Jamieson,* 182 U. S., 461, where this court overruled the lower courts and expressly sustained a system of elimination and substitution that in principle is not distinguishable from that of petitioner's. In fact, a similar system now prevails upon all the active commercial exchanges.

Other grain buyers corroborated Mr. Marcy as to this hedging. (Rec., 141, 164, 182, 209.) *This evidence shows that practically all the grain brought to Chicago is thus hedged against upon petitioner's exchange.* This record shows that the receipts of wheat, corn and oats in Chicago for the year 1900 were 287,741,515 bushels. This does not represent, however, the total volume of these hedging contracts by grain dealers. Much grain bought by them and hedged against in these pits is subsequently diverted to other markets. (Rec., 111-210.) Grain buyers at other points hedge on the Chicago market. When put into elevators and carried by the purchasers from these grain buyers until it goes into consumption, it is also hedged against. (Rec., 114, 892.)

Millers, when selling flour to be delivered in the future, hedge upon petitioner's exchange by buying an equivalent in wheat for future delivery. Sometimes this wheat will be used to produce the flour, but more frequently the millers buy upon personal inspection and in car lots the

kind of wheat best suited for grinding, as it comes into the market, and then make counter sales to close their hedging purchases. So, too, millers, who accumulate wheat for future grinding, hedge by selling a like quantity for future delivery, thus protecting against a decline. Mr. Rice, a large miller, testified (Rec., 196) that otherwise millers would be obliged to take a larger margin of profit to protect against the fluctuations of the market.

Of hedging by millers, the U. S. Industrial Commission (Final Report, Vol. 19, p. 186) says:

"This system, as stated by entirely trustworthy representatives of the trade, has been found absolutely necessary in order to prevent millers from assuming the extraordinary risk of changes in the market value of wheat. Only the more speculative and daring millers would undertake to fulfill future contracts without exercising this precaution of purchasing "wheat futures."

This hedging is resorted to also by the packers (Rec., 1341-2), exporters, etc. In short, it has become an essential facility in the present day methods of handling the products of the farm between the producers and the consumers.

It is impossible to attain even an approximate idea of the volume of this hedging business upon petitioner's exchange. The brief of respondents' counsel in the lower court admitted that it "constitutes a very large part of the dealings in the pits."

It thus appears that the Circuit Court of Appeals in condemning as "in all essentials gambling transactions" all this future trading when not followed by actual delivery, has branded as illegal these hedging contracts, and has branded as law-breakers all dealers and merchants who engage in them.

On the other hand, we contend that the many grain dealers, millers, etc., who, as incidental to their business, resort to this hedging, are not gamblers; that in these transactions the gambling intent—and that is the real question—is wholly absent. The gambler upon exchanges is one who wishes to take the risk of the fluctuations of the market in order to thereby profit. The merchant who hedges resorts to the market not to take a risk, but to avoid all risk. The two transactions are essentially different in intent and in legal contemplation.

It would be difficult to suggest a commercial question of more gravity and importance, or to foresee the far reaching consequence to commerce, if this decision of the Circuit Court of Appeals is to stand.

But even if the greater part of this trading be illegal as between the traders, does it follow that petitioner is guilty of violating this statute? It is a criminal statute, to be strictly construed, and petitioner should not be held to violate it unless guilty of some intentional wrongdoing. As the alleged "pretended buying or selling" is not "conducted" by it, the only provision of this statute which petitioner can violate is that which prohibits the keeping of a place where it is "permitted."

The word "permitted" implies the doing of something which the party could reasonably prevent. Hence petitioner's misconduct, if any, must consist in its failure to make reasonable efforts to prevent trading in which delivery is not contemplated.

In what, then, does the misconduct of petitioner consist? It transacts no business. It maintains an exchange hall, admits and expels members, and provides rules to govern them in their relations to it and in their transactions with each

other upon its exchange. These rules contemplate and facilitate a method of settlement of trades by offsetting, as it might lawfully do. (*Clews* v. *Jamieson*, 182 U. S., 461.) These rules also provide as follows (Rule IV):

Sec. 8. "Any member of the association who shall be interested or associated in business with, or who shall act as the representative of, or who shall knowingly execute any order or orders for the account of any organization, firm or individual engaged in the business of dealing in differences on the fluctuations in the market price of any commodity—without a *bona fide* purchase and sale of property for an actual delivery—shall be deemed guilty of unmercantile conduct, which renders him unworthy to be a member of the association; and upon complaint to, and conviction thereof by the Board of Directors, he shall be expelled from membership in the association."

Sec. 9. "When any member shall be guilty of making or reporting any false or fictitious purchase or sale * * * or when a member shall, either in the Exchange Building, or elsewhere, contract to give to himself or another the option to sell or buy any of the articles dealt in on this Exchange in violation of any criminal statute of this state, he shall be expelled by the Board of Directors."

Petitioner also exacts from each of its incoming members an agreement to abide by its rules.

The above rules are practically the same as in *Clews* v. *Jamieson* (182 U. S., 461), wherein this court said:

"Of course we do not say that these rules actually prevent gambling on the exchange. It is possible, if not probable, that gambling may be and is in fact carried on there, but it must be in violation of, and not pursuant to, the rules."

Similar rules were, in *Bibb* v. *Allen*, 149 U. S., 499, held to establish the legality of contracts made with reference to them in the absence of clear proof of a mutual intent not to deliver.

The purely speculative transactions are not distinguishable

from the others. They are alike in form, made in the same way, and to outward appearances are the same. If petitioner were to constantly surround its pits with official watchers, they could not distinguish the one kind of contract from the other, nor separate the quotations. What distinguishes the transactions is the *intention* of the parties. But how can petitioner ascertain what is in the minds of the traders or their customers? As well said by Judge Hook in this case (Rec., 959):

"Common experience justifies the observation that in the great majority of cases it is impossible to secure the requisite evidence of the gaming character of such transactions. And it is not competent to any finite being to search the minds of the participants and discover their purposes and intentions."

The speculative spirit is innate. So long as the desire for gain finds a place in the human breast, there will be speculation. This spirit of speculation will always be attracted to commodities susceptible to ready transfer. Grain is such, because, when put into warehouses and divided into grades, it assumes for transferring purposes the form of a document transferable from hand to hand. The same is true of corporate stocks.

It is the function of exchanges to improve the facilities for transfer in aid of legitimate commerce. When the market is thus made and these facilities created, the speculators step in and avail themselves of them. To this extent, and to this extent only, can petitioner be said to contribute to improper speculation. It performs with a high degree of efficiency its function of facilitating legitimate commerce, as its prominence as a grain and provision exchange shows. Because it has done this, speculation resorts to it. But this is also true of the New York Stock Exchange, the Chicago Stock Exchange, the New Or-

leans Cotton Exchange, etc. Yet, although this constitutes the head and front of its offending, the Circuit Court of Appeals holds it a criminal and a discredited suitor in the Federal courts. For doing what? For furnishing facilities for legitimate commerce, which the speculative spirit also avails itself of.

Now, how can this decision be reconciled with *Clews* v. *Jamieson* (182 U. S., 461)? In that case the transactions under consideration arose in Illinois. This same criminal statute was under review by this court. The lower courts adjudged the transactions gambling ones because entered into with reference to a certain facility for ready settlement which the rules of the Chicago Stock Exchange provide, known as trading "for the account." But this court adjudged this facility for trading legal, and upheld the transactions made with reference to it. If we read that decision right, it upholds the action of the exchanges in providing efficient facilities for trade, although these facilities are such as speculators will avail themselves of. If so, is it not clear that the Circuit Court of Appeals has in effect ignored *Clews* v. *Jamieson;* for it decides, in applying the laws of the same state, that petitioner cannot sue in the Federal courts because its exchange—which is but the sum total of its facilities for trade—gives rise to much illegal speculation?

Further, is it not apparent, when the actual situation upon petitioner's exchange is considered, that nothing short of the prohibition of *all* contracts for future delivery would prevent speculation? The legislature, if it intended this statute to apply to this exchange, must be held to have contemplated a prohibition of all time trading thereon.

But the State of Illinois has evinced no intention to pro-

hibit all contracts for future delivery in order to stop illegal speculation, and in view of the recent experience of Germany in this direction (see article in Century Magazine, September, 1903), is not liable to do so. It doubtless appreciates that all speculation can no more be suppressed than can all drinking, and that, whatever may be its moral aspects, speculation has upon these exchanges a distinct commercial value. This time trading, as fully explained in the final report of the United States Industrial Commission, Vol. 6, pp. 5, 23, 28, 29, 189-192, 223 and 224, Vol. 19, pp. 185, 186, is an essential part of the distributive system by which the crops are marketed. That these grain buyers may sell for future delivery to hedge, there must be others there willing to buy for future delivery. The presence of these latter creates a market—and the more of them there are the broader is this market—which, meeting and absorbing these hedging sales, carries the grain (to the advantage of producers and consumers), from the time the farmers sell it in the fall until it is absorbed during the year by the consumers.

As said by Judge Hook (Rec., 959):

"A vast volume of legitimate business is admittedly transacted on the exchange. The Board of Trade performs a most important function in the internal commerce of this country."

There is therefore no warrant, either in law or in the facts for branding, as the Circuit Court of Appeals does, petitioner as a criminal. It does not violate this criminal statute of Illinois.

In Conclusion—Upon the result of this application will depend the success of the laudable efforts of this exchange to keep its quotations from bucket shops.

It seems no longer a controverted question that these mar-

ket quotations are a species of property which the court of equity will protect by injunction. (*Illinois Com. Co.* v. *Cleveland Telegraph Co.*, 56 C. C. A., 205; 119 Fed., 301; *Cleveland Tel. Co.* v. *Stone*, 105 Fed., 794; *Board of Trade* v. *Thomson Com. Co.*, 103 Fed., 902; s. c., 109 Fed., 705, Judge Hook's opinion in this case, Rec., 956.) The same rule is declared in England respecting the quotations of the London Stock Exchange (*Exchange Tel. Co.* v. *Gregory*, L. R. 1896, 1 Q. B., 147), and in Massachusetts respecting certain trade news similarly disseminated. (*F. W. Dodge Construction Co.* v. *Information Con. Co.*, 183 Mass., 62.)

This campaign of petitioner for the protection of its quotations has been demonstrated to be feasible. If sanctioned by the courts and followed, as it probably will be by the other leading exchanges, bucket-shops will be suppressed by being deprived of quotations to bet upon. If, however, the doors of the courts are to be closed against petitioner, its efforts will be defeated, and it is not at all probable that other exchanges will then incur the expense of like efforts.

The bucket-shops will then become permanent institutions, criminal laws having been found inadequate for their suppression.

Respectfully submitted in the belief that this record justifies the issuance of a *certiorari*.

HENRY S. ROBBINS,
Counsel for Petitioner.

CONFLICTING DECISION BY THE CIRCUIT COURT OF APPEALS OF THE SEVENTH CIRCUIT.

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SEVENTH CIRCUIT.

No. 1032, OCTOBER TERM, 1903, JANUARY SESSION, 1904.

BOARD OF TRADE OF THE CITY OF CHICAGO,
Appellant,

vs.

THE L. A. KINSEY COMPANY, A CORPORATION, LOUIS A. KINSEY, FRANK M. KETCHAM, JOHN S. ROBERTS, MARTIN A. LASKEY, JAMES H. DUNN, ROBERT B. DUNGAN, ET AL.,
Appellees.

Appeal from the Circuit Court of the United States for the District of Indiana.

Before JENKINS, GROSSCUP and BAKER, *Circuit Judges.*

On final hearing appellant's bill to enjoin appellees from purloining its continuous quotations was dismissed for want of equity.

Appellees discuss the questions whether the quotations are property and whether, if so, appellant lost its proprietary right by its method of giving them out; but that part of the case is ruled in this court by the decisions in *Illinois Commission Co.* v. *Cleveland Telegr. Co.*, 119 Fed. 301, and *Sullivan* v. *Postal Telegr. Cable Co.*, 123 Fed. 411.

There is, however, one further matter that requires presentation and decision. It pertains to the defense that appellant has no standing in a court of equity for either or both of two reasons: that the quotations are contraband and may be seized by any one with impunity; that appellant, even if the quotations themselves are not contraband, comes into court with unclean hands in this, that it seeks to exclude all others from using property (the quotations) which

might be put to good uses, in order that it may aid its members in maintaining the gambling in grains and provisions which it permits to be carried on in its exchange hall.

Respecting the facts of this defense, the master found as follows:

"The transactions conducted in the 'pits' of the complainant association, while they are of the same general character, are divisible into two classes, which are described by the members of the Board of Trade as *hedging* transactions and *speculating* transactions, respectively. Of the members of the complainant association who are engaged in business in the Exchange Hall, the number conducting speculative transactions is between one-third and one-half of the total, and practically all of such members conduct a *hedging* business.

"The principals who are engaged in hedging transactions are, generally speaking, either grain merchants, millers, or manufacturers of grain products. The method of such principals is this: When they have bought grain in the country or in city warehouses which they propose to hold for future sales to domestic or foreign purchasers they at once sell in the pits of the complainant association an equal amount of grain; or, on the other hand, if they have sold to domestic or foreign purchasers grain or grain products, for future delivery, they at once buy in the pits of the complainant association an equal amount of grain for future delivery at times corresponding with the times of their selling contracts. And thus when they have contracts of purchase they have contracts of sale for future delivery in the pits practically even with their purchases, and if they have contracts of sale with domestic or foreign purchasers, they have contracts of purchase for future delivery in the pits practically even with such contracts of sale. The object of such hedging is to insure against loss by fluctuation in the market in the commodity which the principal is carrying or which he has sold in advance of purchase and manufacture upon a time contract. A hedge must always be against a cash commodity.

"A speculative transaction is not based upon a cash commodity primarily. In effect it is based upon the confidence which on the one hand the seller of a commodity for future delivery has in his personal opinion that the price of the commodity sold will by the time of delivery have so declined that he can purchase the commodity for less than his selling price and thus make a profit, and which on the other hand, the buyer has in his personal opinion that the price of the commodity bought will so advance by the time of delivery that the commodity bought will be worth more at the time of delivery than it was at the time of purchase and that he will thus have a profit. It is possible under the rules, usages and practice of the complainant association for the seller and the buyer, respectively, if either changes his

opinion, to buy or sell in the 'pits' the commodity which he has previously sold or bought, as the case may be, for the same time of delivery; while this procedure is in form the same as hedging, it is not designated as 'hedging,' but is styled 'spreading.' It is also possible under the rules, usages and practices of the complainant association for a member of the complainant association to make such counter contract of purchase or sale during the same day that he has under an original contract of sale or purchase and thus within the day or within a few days to have his advantage of profit or to adjust his disadvantage of loss; such a course of business is designated 'scalping.'

"The evidence does not contain sufficient data upon which to predicate an estimate of the aggregate volume of business conducted in said pits daily, monthly or yearly; it does appear, however, that the volume of such business is enormous; one firm conducted transactions in wheat daily aggregating 1,500,000 to 2,000,000 bushels, and in corn 1,000,000 bushels daily; another firm's transactions in wheat daily amounted to 6,000,000 bushels; a third firm's transactions in wheat daily amounted to 4,000,000 bushels; a fourth firm's transactions amounted to 1,000,000 bushels daily; a fifth firm's transactions in all grain amounted to 1,800,000 bushels daily, and a sixth firm's transactions in all grain amounted to 2,000,000 bushels daily. While it is true that the business of these six firms in the pits is much larger than the business of any other six firms conducting transactions in the pits and that it would not be proper to say that the average business is a proper average of each of the persons conducting transactions in the pits, it is nevertheless true that it is fairly deducible from the evidence that the aggregate business transactions in grain was largely in excess of the total wheat and corn production of the entire United States during either of the years 1900 and 1901 and was many times over the entire receipts in Chicago of grain during each of said two years of 1900 and 1901 and of such receipts in Chicago less than twenty per cent. inspected up to grades of grain which could be delivered upon time contracts made by said sales and purchases in the pits. It is also true that a decrease in the total grain productions of the United States does not cause a proportionate decrease in the volume of business done in the 'pits' of the complainant association, but on the contrary such business is larger during a year in which there is a shortage in the grain crop.

"Under the rules, usages and practice of the complainant association all time contracts made in the 'pits' are carried until it is possible to close them as between members of the complainant association by either one of three methods of settlement, namely, the method called 'direct settlement,' the method called 'rings' or 'ringing out'

and the method of delivery by delivering warehouse receipts physically or 'by notice.'

"Most time contracts made in the 'pits' are adjusted as between members of the complainant association before the specified time of delivery arrives by either the first or the second of the above named methods. Direct settlements are effected by offsetting similar contracts at the close of the business hours of each day in the following manner. As soon as is practicable after the close of business in the 'pits' each broker—individual, firm or corporation conducting business in the 'pits' takes from the day's transactions on his books the contracts similar as to amount and time of delivery to counter contracts made with other members of the complainant association and ascertains therefrom the difference of the aggregate prices of such similar contracts, and if the difference be in his favor, the amount of such difference is charged to the other party in such counter contracts, and if the difference is against him, such difference is credited to the other party to such counter contract; the following is a simple illustration: if during the day broker A has sold to broker B 5,000 bushels of December wheat at 75 cents per bushel and broker B has sold to broker A 5,000 bushels of December wheat at 76 cents per bushel, after offsetting the contracts at 75 cents per bushel, there is a difference in B's favor of one cent on each bushel or $50. This offsetting difference in cash is placed as a debit or credit, as the case may be, upon the clearing house sheet hereinafter described of the respective brokers, parties to said counter or offsetting contracts.

"The 'ring' method of settlement is as follows: each broker (person, firm or corporation) conducting business in the 'pits' has an employe who is called a 'settlement clerk,' who keeps a record of all his employer's transactions in the 'pits'; the complainant association furnishes a room wherein all of such settlement clerks meet at stated hours each day and compare their respective books called "settlement books," which are required by the complainant association to be kept by each broker. Upon comparing their respective books said settlement clerks ascertain what, if any, outstanding time contracts may be offset by some other corresponding time contract made by the parties with other members of the association and which of such contracts are by consent of the parties thereto permitted to be offset and thereupon under the rules of the complainant association are deemed to have been settled provided the requirements of sections 6, 7, 8 and 9 of rule 22 of the complainant association are met as therein provided with reference to the clearing house sheet and other details of settlement therein specified. * * *

"Theoretically and in bare outline, an illustration of the 'ringing out' method is as follows: Broker A sells to Broker B 5,000 bushels

May wheat, Broker B sells to Broker C the same amount, Broker C sells to Broker D the same amount and Broker D sells to Broker A the same amount; by consent of Brokers A, B, C and D all of these time contracts are deemed discharged and by novation there is substituted a contract wherein Broker A, the initial seller in the series of discharged contracts, sells to Broker D the last buyer in the series of discharged contracts. The Clearing House sheets of the complainant association in evidence in this suit show that the actual process of 'ringing out' time contracts by elimination and substitution, is much more complicated than the outline illustration, but that illustration exhibits the principle of the process. Among the daily transactions in complainant's 'pits' there are 'hedging' contracts, 'spreads' and 'scalping' contracts; and all of these forms of time contracts are adjusted by both the 'direct' method and the 'ring' method of settlement. Upon the question that (what) part of all the transactions in the pits are adjusted by the 'direct' method and the 'ring' method of settlement the evidence is not very satisfactory. It tends to show, however, and I accordingly so find, that at least three-fourths of the total transactions in the pits are adjusted by the 'direct' and 'ring' method of settlement.

"In the event that said time contracts cannot be settled by either the 'direct' method or the 'ring' method, they are and *must be* closed by a third method, namely, delivery under the rules and usages of the complainant association. Said rules are as follows:

"Rule XXI—Section 1. All deliveries upon contracts for grain or flax seed unless otherwise expressly provided, shall be made by tender of regular warehouse receipts." * * *

"The rules of the complainant association do not permit any persons other than members of said association to make 'time' contracts upon the floor of the Exchange Hall and all 'time' contracts made in the pits are contracts between the members of the complainant association, who are in said transactions respectively sellers and buyers. The rules of the complainant association permit members of said association as between themselves and non-members to act as brokers in 'time' contracts made in the pits. In case a member of the complainant association in making a 'time' contract in the pits acts as a broker for an undisclosed principal if such contract is settled by either the 'direct' method or the 'ring' method, such settlement does not discharge it so far as such undisclosed principal is concerned, as between him and his broker, but the latter is required under complainant's rules to substitute a duplicate 'time' contract with the two elements of identity, namely, like amount of grain or other commodity and like date of delivery, but not like price. If such substituted contract is not a duplicate, but differs from the original in price, the broker

becomes principal as to difference in the prices between the original and the substituted contract, and if it is impossible for such broker to substitute either a duplicate or a similar time contract, the broker becomes principal as to the entire time contract instead of the original principal with whom he as broker, in behalf of his own undisclosed principal, entered into said original contract.

"The system of 'hedging' in the pits has a commercial influence which is favorable both to the interest of the producer and the consumer, in that the large cash grain houses, which conduct transactions in complainant's Exchange Hall by reason of the risk to them from market fluctuations being decreased through 'hedges' are able to take and do take a smaller margin of profit and thus they pay to the producer a higher price and sell to the consumer at a lower price; the person taking the side of such hedging contract opposite of that to such grain house, is the person who assumes the risk.

"The 'direct' method of settlement and the 'ring' method of settlement is not only an advantage to the members of the complainant association in that it relieves them from the responsibility of carrying their contracts with other members of the complainant association, but they have added to this advantage the benefit of the margins deposited with them by the undisclosed principals for whom they act as brokers. * * *

"Section 8 of Rule IV of the complainant association is as follows:

"Sec. 8. Any member of the association who shall be interested or associated in business with, or who shall act as the representative of, or who shall knowingly execute any order or orders for the account of any organization, firm or individual engaged in the business of dealing in differences on the fluctuations in the market price of any commodity—without a *bona fide* purchase and sale of property for an actual delivery—shall be deemed guilty of unmercantile conduct, which renders him unworthy to be a member of the association; and upon complaint to and conviction thereof by the board of directors, he shall be expelled from membership in the association. * * *

"The complainant association has prescribed no method or means which shall be employed by members of said association for the purpose of ascertaining the intent of their respective customers with respect to the delivery or non-delivery of the commodity covered by any time contract.

"Every member of the complainant association acting in the pits as a broker for a non-member customer requires from such customer a deposit as security in each transaction conducted by him, and this fact is within the knowledge of the directors and executive officers of the complainant association. The rules of the complainant asso-

ciation authorize the members of said association who act as brokers to charge broker's commissions in amounts fixed by such rules. One of such commission charges is expressed in part as follows:

'For the purchase or sale and for the purchase and sale of property for future delivery, whether the contract for purchase or for sale be first made as follows:' * * *

"Using a member of the complainant association as his broker, a non-member thereof may become a party to a time contract as buyer or seller and at any time before the date of required delivery he may become a party to another contract in which he takes the opposite side to that held by him in the first mentioned contract; such counter or reverse time contract may be authorized in the same order which authorizes the first contract by including in said order a so-called 'stop-loss' order; when such contracts are made they may be settled and are often so settled as between the member of the complainant association who acted as broker and his non-member customer by the payment of the difference between the contract prices. The fact that such is the custom is a fact well known to the directors and executive officers of the complainant association.

"The rules of the complainant association provide for settlements of time contracts made in the pits when the seller does not deliver the property on the last day of the month of the stipulated delivery—the rules and usages of the complainant association fix such last day of the month as final day of delivery—by allowing the purchasers the privilege of electing: first, to consider the contract forfeited; second, to purchase the property on the market for account of the seller at 1:15 o'clock of the next business day; or third, by requiring a settlement with the seller at the average market price of the property sold on the last day of the month of delivery."

The master drew conclusions favorable to appellant and recommended a decree in accordance with the prayer of the bill.

The court, reviewing the matter on exceptions, sustained the master's findings of fact except that the percentage of transactions in which no actual deliveries were made was nearer 95 than 75; but disagreed with the master's conclusions (125 Fed. 72) and dismissed the bill for want of equity.

BAKER, *Circuit Judge,* delivered the opinion of the Court:

I. We deem it unnecessary to determine from the evidence whether the percentage of trades in which actual deliveries were made was 5 or 25. The finding of the one figure or the other would not prove what proportion of the remaining no-delivery transactions were gambling. Of these, an indeterminate number were "hedging

contracts." If we felt called upon by the necessities of this decision to give a definite opinion of hedging, the record might well lead us to find that hedging is a manufacturer's or merchant's insurance against price-fluctuation of materials, and no more damnatory than insurance of property and life, which in one sense are wagers that the property will not be destroyed during the term and that the life will not fail in less than the expectancy in the actuaries' tables. The remainder of the no-delivery transactions were "speculative." But speculation is not unlawful. One may buy any sort of property to hold for a rise; one may contract to buy or sell property not in possession or in existence at the time; and lawful contracts may lawfully be cancelled and settled in advance of the time of performance. If a contract, lawful in form, is entered into, it is lawful in fact even though one of the parties never intended to perform his part of it; that is, the intent that the lawful form shall cover a sham must be mutual to make it a sham. We think the court's conclusion that, because in 95 per cent of the trades no deliveries were in fact made, it was intended that in those cases deliveries should not be made, and that the parties in nineteen instances out of twenty were using the forms of lawful contracts to cover mere wagers on the future prices of commodities, is not warranted by the facts in the record. The "direct" and "ring" methods of settlement between members might cancel out nine-tenths of the bids back and forth between the members as agents, and yet every contract may have been perfectly legal and enforceable between the principals, and every principal satisfied by receiving a "substitute" contract. If a seller intended not to deliver but to settle on differences if prices rose, the buyer who entered into the contract in good faith and who desired to receive the property could not force the seller to deliver. In every such case there would be no delivery, but the buyer would have a valid cause of action. Undoubtedly gambling was going on in the exchange hall; but it was contrary to appellant's by-laws. Appellant was chartered by Illinois for a lawful and useful purpose, and the association adopted and promulgated suitable by-laws and rules. We think the record fails to show that the dominant feature of the members' dealings was unlawful, much less that appellant, as a creature of the State, was violating its charter or was particeps criminis in what gambling the members carried on.

We do not, however, attach very much importance to the preponderating character of the transactions in the exchange hall, because, in our opinion—

II. The real subject-matter of the suit is the property-right in the news, in the reports of prices. Even if it were true that 95 per

cent of the dealings in the exchange hall were wagers, the prices are the same for the transactions that are not wagers, and the quotations sent out show the figures at which honest dealers may secure contracts. Millers, grain-buyers, elevator companies, govern their dealings by the market prices made in appellant's exchange hall. The news therefore serves, or at least is capable of serving, a useful purpose. So it seems to us immaterial what proportion of the transactions are wagers, since the prices made in the transactions are the prices that farmers and shippers can get, and since the news of the prices and the dissemination thereof are valuable to the community. News may be an object of lawful ownership, though nine-tenths of the things reported be unlawful.

III. Nor should the property in this case (the news, the continuous quotation of prices) be adjudged contraband because it is susceptible of bad uses as well as good. Gamblers in Indiana may settle their bets on prices according to appellant's quotations, and this quite irrespective of the fact, if it were the fact, that 95 per cent of the transactions in appellant's exchange hall were lawful, Just as Indiana grain-dealers may make and settle their honest contracts on the basis of appellant's quotations regardless of the fact, if it were the fact, that 95 per cent of transactions reported were gambling. It seems to us, therefore, that the news as news is not without the pale of protection and that the moral quality is chargeable solely to the user.

IV. The property concerned in this suit not being contraband, should appellant be denied the writ of injunction even if it were true that appellant permits gambling in its exchange hall? We think not. Suppose this non-contraband news were collected and disseminated by the Associated Press. If that company were complainant and "clean-handed," its right to an injunction, the case being proper in other respects, would not be doubted. But if complainant were a gambler or a thief, what then? We think our answer has been sufficiently stated in *Fuller* v. *Berger*, 120 Fed. 274: "Equity is not concerned with the general morals of a complainant,—the taint that is regarded must affect the particular right asserted in his suit. * * * If the defendant can do no more than show that the complainant has committed some legal or moral offense, which affects the defendant only as it does the public at large, the court must grant the equitable remedy and leave the punishment of the offender to other forums." In this case, the appellees, citizens of Indiana, have never had any dealings with appellant respecting the quotations; they have not been misled or deceived by appellant in any way; and they certainly are no more concerned with or affected by appellant's viola-

tions of the common law or of the penal laws of Illinois than the general public.

In reaching our conclusion, we have given respectful consideration to the cases of *Board of Trade* v. *O'Dell Com. Co.*, 115 Fed. 574, *Board of Trade* v. *Donovan Com. Co.*, 121 Fed. 1012, *Board of Trade* v. *Ellis*, 122 Fed. 319, *Christie Grain & Stock Co.* v. *Board of Trade*, 125 Fed. 161, and regret that we are unable to concur therein. We have been aided by the opinion of Judge Hook at circuit (116 Fed. 944) in support of his decree in the *Christie* case, which was reversed in 125 Fed. 161.

The decree herein is reversed, with the direction to enter a decree in appellant's favor in conformity to the prayer of the bill.